

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

BOSTON ALLIANCE OF GAY, LESBIAN, )  
BISEXUAL AND TRANSGENDER YOUTH )  
(BAGLY), et al, )

Plaintiffs )

CA No. 20-11297-PBS

Pages 1 - 19

-VS-

UNITED STATES DEPARTMENT OF )  
HEALTH AND HUMAN SERVICES, )  
et al, )

Defendants )

**MOTION HEARING VIA VIDEO**

BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way  
Boston, Massachusetts 02210  
June 2, 2022, 9:34 a.m.

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 7200  
Boston, MA 02210  
leemarz@aol.com

1 A P P E A R A N C E S:

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4 for the Plaintiffs.

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7 for the Plaintiffs.

8 LIAM C. HOLLAND, ESQ., United States Department of  
9 Justice, Federal Programs Branch, PO Box 883, Washington, DC,  
10 20044, for the Defendants.  
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P R O C E E D I N G S

THE CLERK: Good morning, Judge.

THE COURT: Good morning to everyone.

MR. KETTLEWELL: Good morning, your Honor.

THE CLERK: I'll call the case. The Court calls Civil  
Action 20-11297, BAGLY v. United States Department of Health  
and Human Services, et al.

Could counsel please identify themselves.

MR. KETTLEWELL: Yes, your Honor. William Kettlewell  
together with Jo-Ann Sagar for the plaintiffs.

MR. HOLLAND: And this is Liam Holland for the  
government, your Honor.

THE COURT: Good. Well, I wasn't sure whether to call  
this a status conference or a Rule 16 conference, but I think  
it's time to get going on this case. So what do you all -- I  
have an old scheduling order. I'm not sure if it's still  
appropriate, but, as I understand it -- maybe Mr. Holland can  
help me -- there's been no proposed rulemaking or rule issued  
yet?

MR. HOLLAND: Your Honor, in October the Court joined  
every other court presiding over the 2020 rule in staying  
proceedings in this case because it recognized that it's not  
pragmatic to continue wasting judicial and party resources on  
this litigation when they are diligently working to address the  
rule administratively. My client HHS has submitted the

1 proposed rule to OIRA. It did so in --

2 THE COURT: Wait, stop. What's that?

3 MR. HOLLAND: Sorry. The Office of Management and  
4 Budget, Office of Information and Regulatory Affairs.

5 THE COURT: You thought I'd know what OIRA was?

6 MR. HOLLAND: I'm sorry, your Honor. I'm in the weeds  
7 of this all the time and I -- no. So let me just explain that  
8 OIRA --

9 THE COURT: Is that the thing Cass Sunstein set up?

09:36 10 MR. HOLLAND: I think it was around before Cass  
11 Sunstein, but he was definitely actively involved in it and  
12 what it is today. But under executive order, HHS is not  
13 allowed to put the proposed rule out publicly at this point  
14 before it undergoes a brief review by the Office of Information  
15 and Regulatory Affairs. That review has already been ongoing  
16 since March 22 when HHS submitted the proposed rule to OIRA, so  
17 there is every reason to believe that the proposed rule will be  
18 out very, very soon. And so for the same reasons that this  
19 Court --

09:36 20 THE COURT: And how long is that process? Probably by  
21 the time -- you have to usually have 60 or 90 days' worth of  
22 comments once it's issued, and then it usually takes another  
23 year to issue a rule, right?

24 MR. HOLLAND: So, like, look, your Honor, you're kind  
25 of, like, asking me when the jury is coming back with its

1 verdict, right?

2 THE COURT: I know, but that's usually days, not  
3 years.

4 MR. HOLLAND: So we're, like, pausing this litigation  
5 because another case has its jury out. You know, like, the  
6 point is, there's no guarantee this litigation is going to end  
7 up moving any more quickly. There's no guarantee this  
8 litigation is going to end up producing the outcome the  
9 plaintiffs want. Meanwhile, the agency is doing the very  
09:37 10 thing -- it's addressing the very things the plaintiffs want.

11 So I've never encountered -- when we're in civil  
12 litigation, the defendants are basically saying, you know,  
13 we're doing this, right? So why would we move forward in this  
14 case when we're already doing this? And there's no reason to  
15 believe --

16 THE COURT: Because it's so slow. It's so slow. It  
17 will be like the Trump administration issued it on the eve of  
18 its leaving office, you know? Just it's not going to even  
19 issue for a couple of years. I just need something -- this is  
09:38 20 what I'm going to do.

21 MR. HOLLAND: Your Honor, may I address that because  
22 why don't we -- I'm comparing -- the Obama administration's  
23 proposed rule on OIRA only took four months and four days. So  
24 this has been around since March 22 --

25 THE COURT: Four months -- excuse me -- it took four

1 months, so now it's been two and a half months? Is that it?  
2 That's your prediction, that it's going to be out in four  
3 months?

4 MR. HOLLAND: I am not here to make predictions. You  
5 know, I can't predict how long this litigation is going to  
6 take. But at the same time, the plaintiffs have filed some  
7 status report where they say, like, oh, the Trump  
8 administration's proposed rule took a year. I'm just saying  
9 that there is no basis for speculating that that's going to  
09:38 10 take that -- that's completely out-of-the-question ridiculous  
11 when there is every reason to believe that this thing is coming  
12 out, like, very soon. And I'm just saying, for an additional  
13 data point, the Obama administration's proposed rule that you  
14 might think would be more closely aligned with what this  
15 administration is doing, I don't know --

16 THE COURT: Well, of course it's more closely aligned,  
17 I agree with that, with Obama than with Trump. I for sure  
18 agree with that. But that said, I think what we should do is  
19 set a schedule, and this may help them move it along. And if  
09:39 20 in fact a full-blown notice gets published that resolves a lot  
21 of the issues, at that point you can move for a stay again; I'm  
22 open to that. But I said last time, and I'll sound like I'm  
23 false, that this was the end of what I was going to do, and  
24 so --

25 MR. HOLLAND: Your Honor --

1 THE COURT: Can I just say this: I understand,  
2 Mr. Holland, but I am going to set a schedule. And then if the  
3 notice comes out, I will be open to stay it. But we've got to  
4 start putting together this -- have you started putting  
5 together an administrative record?

6 MR. HOLLAND: Well, the agency, you know, compiled the  
7 administrative record many years ago. I believe that  
8 administrative record still exists. I have spoken with the  
9 agency about getting it together for this proceeding, if  
09:40 10 necessary, how long it might take, and they still haven't got  
11 back to me about that. So I can let you know. I mean, earlier  
12 we said about 45 days would be enough time, but it's a very,  
13 very large rule, I mean, a very, very large --

14 THE COURT: No, I agree, and I'm not eager to jump  
15 into it if the whole thing is moot.

16 MR. HOLLAND: Can I --

17 THE COURT: No. I've got a schedule, an old schedule,  
18 really old, a really old schedule. I forget when it was issued  
19 but it was many moons ago. Two years ago maybe? We've been  
09:40 20 interrupted by COVID and the hope that something would come  
21 out. I've gone through multiple law clerks. Realistically, I  
22 won't be able to deal with this issue with this traunch of law  
23 clerks, and realistically this won't be happening till next  
24 year anyway, I mean, next clerkship year or academic year. So  
25 I'm trying to just put something in place, and if the rule

1 issues, come back to me.

2 MR. HOLLAND: On that point, your Honor, may I just  
3 suggest that the Court order something that suggests that if we  
4 issue notice to the Court and provide a copy of the proposed  
5 rule, that the Court stay deadlines and provide the parties  
6 with the requirement that they meet and confer about what the  
7 proposed rule says, and to meet again about whether it makes  
8 sense to go forward?

9 MS. SAGAR: Your Honor, before you rule on that, could  
09:41 10 I be heard in response to that? It's always been the  
11 plaintiffs' position that our clients are being harmed so long  
12 as the Rollback Rule remains in effect. The event that  
13 Mr. Holland is driving towards is the issuance of a notice of  
14 proposed rulemaking, which does not change the rules that  
15 govern the insurers, the rules that govern the healthcare  
16 providers that are causing the harms to my clients. The only  
17 thing that would change that would be the issuance of a final  
18 rule.

19 Where we are now as compared to where we were in the  
09:42 20 last administration, you know, as your Honor noted, the rule  
21 sat with O&B for a year, and then, after that, there was notice  
22 and comment. After that, the agency analyzed the notice and  
23 comment. The final rule didn't come out until another year  
24 after that, so, you know, on the schedule, what happened last  
25 time, two years until we would get relief. So, you know,



1 plaintiffs would not be comfortable with an automatic stay  
2 being put in effect.

3 THE COURT: I'm not doing an automatic anything, but  
4 what I am doing is, I'm going to issue a scheduling order  
5 today. And the government proposed, and I'm happy to live with  
6 it, that you -- I've already ruled on motion to dismiss  
7 standing, blah-blah-blah, so we're now at the point of agency  
8 review. And if the Court denies the pending motion to dismiss,  
9 which I did in part and allowed in part -- I went and  
09:43 10 reviewed -- I couldn't even remember what I did -- so 45 days  
11 from now the administrative record should be put together.

12 MS. SAGAR: Can we be heard on the 45 days, your  
13 Honor, just briefly?

14 THE COURT: Well, what do you want?

15 MS. SAGAR: Well, so the government actually hasn't  
16 produced the administrative record. I don't know why the  
17 administrative record would be different. They produced it in  
18 a different case where a party had moved for a preliminary  
19 injunction. Indeed the record exists. We think the government  
09:43 20 should be able to do it faster.

21 Back after the Court had denied the motion for  
22 voluntary remand, the government had suggested a schedule in  
23 which it would answer the complaint 21 days from that denial.  
24 Of course, some of that time has elapsed already, but, you  
25 know, we'd be comfortable with the 21-day horizon that the

1 government had already suggested for filing a responsive  
2 pleading.

3 THE COURT: So that's a good. So we need a responsive  
4 pleading. When can you do that, Mr. Holland?

5 MR. HOLLAND: You know, I think maybe about 60 days,  
6 your Honor. That's the normal responsive pleading deadline in  
7 the Federal Rules of Civil Procedure.

8 MS. SAGAR: Your Honor, this has been pending for two  
9 years. It's also not the normal deadline. After a motion to  
09:44 10 dismiss has been denied, the government would have 14 days. We  
11 agreed to an extension for 21 days to file a --

12 MR. HOLLAND: Your Honor, this case has been stayed  
13 for a year.

14 THE COURT: When can you get it to me, Mr. Holland?  
15 Has it already been in draft?

16 MR. HOLLAND: No. No, your Honor. This case has been  
17 stayed for a year. It has not been in draft. It is a  
18 complex -- it's going to require review at the upper levels of  
19 HHS and at DOJ, and I respectfully am requesting more than  
09:44 20 21 days to put the answer together.

21 THE COURT: Well, what are you asking for?

22 MR. HOLLAND: I asked for 60 days. If that's too much  
23 time, then, you know -- that is actually, 60 days is the  
24 standard time for responding to a complaint in the Federal  
25 Rules of Civil Procedure. This case has been stayed for a

1 year. It's like we're starting new on a brand-new case.

2 THE COURT: Well, no. Hold it, hold it. I ruled on a  
3 motion to dismiss.

4 MR. HOLLAND: That's fair, your Honor. That is fair.

5 THE COURT: It's not a brand-new case. This has been  
6 slow-cooking, and faster here than in some courts.

7 So let's just say this: I will give you 45 days to  
8 both respond and produce an administrative record, so 45 days  
9 to answer and produce a record because it's already been done  
09:45 10 apparently. Your motion for summary judgment comes 90 days  
11 after the administrative record is compiled, and then is the  
12 government likely to file a cross-motion?

13 MR. HOLLAND: Yes, your Honor.

14 THE COURT: Okay. So 90 days from -- why are we  
15 waiting 45 days after plaintiffs filed their motion for summary  
16 judgment? They should probably both come in at the same time.  
17 So 90 days after the defendants produce the administrative  
18 record, both sides will file cross-motions for summary  
19 judgment, and then the oppositions come in in due course within  
09:46 20 30 days. I do like replies within 14 days. I actually like  
21 surreplies, because I think it tees up the issue, within  
22 14 days. And then we should know by then -- I mean, really,  
23 that's a fairly long time -- whether there's going to be a  
24 notice of proposed rulemaking. I am likely, just so the  
25 plaintiffs know this, likely to stay it if they're addressing

1 the issues because there's no need for me to go into a major  
2 constitutional analysis or regulatory analysis if it's the  
3 proposed notice.

4 Now, that said, my guess is, given how angry some of  
5 these -- not angry -- fraught some of these issues are -- I  
6 don't know what the right answer is -- that there will be a lot  
7 of comments on them along the way; and what I want to do is be  
8 in a position to deal with any issue that's, for example, not  
9 addressed at all by the rule. But just fair notice that if  
09:47 10 something is addressed by the rule, I'm likely to defer.

11 MS. SAGAR: Just to clarify, your Honor, by address  
12 the rule, you mean address consistent with what plaintiffs say  
13 the rule should say consistent with the statute? Because of  
14 course the rule could -- the Trump rule addressed all the  
15 issues but addressed it in the wrong way.

16 THE COURT: It doesn't have to be exactly what you  
17 want, I mean, because that's what the notice and comment would  
18 be coming in to talk about. I mean, it's just like -- I don't  
19 know what the right answer is, I forget. To be honest, I don't  
09:48 20 remember the issues well enough that are left. But, you know,  
21 you're looking for the sun, the moon, and the stars, and they  
22 may only give you the sun and the moon, but that's what notice  
23 and comment is all about. In other words, for example, if  
24 there's an issue that doesn't address -- if the rule doesn't  
25 address anything having to do with one of the issues raised --

1 oh, I don't know, say insurance coverage, for example -- then I  
2 would take that up and not wait for notice and comment because  
3 there would be no purpose in it. So I don't even know -- I'm  
4 sure Mr. Holland has actually seen the draft. I don't know if  
5 every single issue is addressed or some are deferred for a  
6 later date. I don't know.

7 MR. HOLLAND: Your Honor, as you know, you know, I  
8 cannot opine on the rule publicly, but I will just say that I  
9 would not be here asking the Court to do everything it's doing  
09:49 10 or it has or was doing, you know, if there was any reason to  
11 believe that these issues weren't being addressed in the new  
12 law.

13 THE COURT: Well, the only one where I thought there  
14 was potential of becoming irreparable harm is the allegation by  
15 the plaintiffs that the insurance companies stopped covering,  
16 stopped providing certain coverage. Others were -- I can't  
17 remember -- either dealt with through preliminary injunctions,  
18 or most of them, some of them I dismissed altogether. I can't  
19 remember the issues well enough, but there was one purely legal  
09:49 20 issue having to do with the Danforth Amendment.

21 MS. SAGAR: Yes, your Honor. I can tell you which  
22 claims you permitted to proceed. Would that be helpful to the  
23 Court?

24 THE COURT: Well, no, because I think at this point  
25 what we're going to do is, we're just going to let this go

1 forward, and there's going to be an answer. And then, ideally  
2 speaking, what I'd love to have happen, because I'm so swamped  
3 right now -- everything that was supposed to have tried during  
4 COVID is trying now, so I'm very busy in court, and likely I  
5 won't get to it this summer. It gives the government plenty of  
6 time to hit that four-and-a-half-month benchmark, and hopefully  
7 this can go through the normal regulatory proceeding. But if  
8 there's an issue that's not hit at all, I'll deal with it. And  
9 if there's an issue that is dealt with, though perhaps not in  
09:50 10 the way you want perfectly, I might wait for the rulemaking  
11 process. It's just time.

12 So what's happening with all these other cases?

13 MR. HOLLAND: Yes, thank you, your Honor. I'd like to  
14 address that. Every single other case is stayed because the  
15 agency is addressing this administratively. So, for example,  
16 in *Whitman-Walker*, which is an EDNY case, the stay had expired  
17 just in May, just like your stay. The court decided that the  
18 stay would continue and has required a joint status report  
19 letter from the parties on October 21, 2022.

09:51 20 *New York v. HHS*, an SDNY case, is stayed until the end  
21 of the final rule. Proposed schedule is due 30 days after the  
22 final rule is issued.

23 *Chinatown v. HHS*, which addresses the issue about  
24 language access, it has been stayed pending a new NPRM. We  
25 have been filing status report updates at the end of every

1 other month.

2           *Whitman-Walker v. HHS*, which is Judge Boasberg's other  
3 case that you have looked to several times in this case, is  
4 also stayed pending the outcome of the notice of proposed  
5 rulemaking. The parties have to file joint status reports at  
6 the end of every other month. In the last joint status report  
7 just a few days ago, the plaintiffs urged the court, just like  
8 these plaintiffs, to please terminate the stay as of July 31,  
9 is what they asked the court because they thought -- I mean,  
09:51 10 these are the plaintiffs who thought it would be reasonable to  
11 give OIRA a little bit more time. The court disagreed with  
12 them, did not adopt their suggestion, and required another  
13 joint status report, as it has been, for August 1, and that  
14 would be the pragmatic thing to do with this law.

15           I just want to stress here that the Obama rule, which  
16 was sent to OIRA, the proposed rule was sent to OIRA April 29,  
17 2015. The final rule was then published about a year later,  
18 May 13, 2016. So if you're telling us, your Honor, we won't  
19 get to this rule in this -- you know, we're having to do all  
09:52 20 this busywork when there's every reason to believe, if we're  
21 consistent with the Obama rule's time period, that this entire  
22 thing, including the final rule, which really isn't the  
23 standard here, that we'll be done within a year.

24           I mean, what actually happened here, your Honor, is  
25 we -- at the end of an APA case, the default rule is a remand.

1 We already asked for a remand because we want to reconsider and  
2 are reconsidering this rule. The courts have been reluctant to  
3 the remand until it saw the proposed rule. So that's why this  
4 plan was stayed before the proposed rule and not the final  
5 rule, because a remand would be appropriate if everything is  
6 being addressed in the proposed rule.

7 THE COURT: And if everything has been addressed, I  
8 might give you a remand, but right now I said "And this is my  
9 last extension." I said that last time. And actually it's a  
09:53 10 month later than I said it was going to be because I was  
11 supposed to do it in early May, and I forget -- maybe I was on  
12 trial -- why I continued the status.

13 But, in any event, this is what I'm going to do, and  
14 then you tell me: If the office of whatever it's called, OIRA,  
15 and you issue the notice of proposed rulemaking and it covers  
16 the issues, I'm open to both a stay and a remand. It's just I  
17 can't be sure. And so that's what I'm doing.

18 So it's an interesting case, and I don't think it's  
19 busywork. You're perhaps feeling frustrated because you've  
09:54 20 seen the rule, I haven't, so you're not in a position to  
21 release it. But I have no idea what OIRA -- who's the head of  
22 it now?

23 MR. HOLLAND: I'm not sure, your Honor. I mean, it's  
24 the Executive Office of the President. At some point the buck  
25 stops with Mr. Biden.



1 THE COURT: Well, in fairness, he has a lot of just as  
2 important issues on his plate. I mean, the war in Ukraine,  
3 he's got a myriad of other issues on his plate, and I get that.  
4 But, ideally speaking, this will help move it along. The  
5 courts are watching.

6 So, anyway, I have no desire to do extra work. As I  
7 just said, I'm utterly swamped. I'm totally open to a stay or  
8 a remand if in fact this case moves at some sort of speed, but  
9 it's been a year and a half.

09:54 10 MR. HOLLAND: I am also very swamped, your Honor, and  
11 I would appreciate it, if the NPRM does come out imminently and  
12 we notify you, if we can get an extension on our deadlines  
13 because it does seem like busywork to me when this is going to  
14 be resolved by the agency. So I just don't want to be in the  
15 position --

16 THE COURT: Excuse me, excuse me. You're not being  
17 asked to do very much, answer a complaint and put together a  
18 record that's already been compiled. That's not much. And  
19 then it's 90 days after that you're briefing summary judgment.  
09:55 20 So if the agency doesn't come up with something by then,  
21 there's a problem.

22 MR. HOLLAND: That's fair in a regular case. I'm not  
23 sure if you read the plaintiffs' allegations about why just  
24 have a remand when everything else -- it's interesting.

25 THE COURT: Have I allowed the deposition? I have not

1 allowed the deposition.

2 MR. HOLLAND: True, but we have to answer their  
3 complaint's allegations. But we'll address it, your Honor.

4 THE COURT: Mr. Severino must be somewhere around,  
5 right?

6 MR. HOLLAND: Not -- I don't know where he is.

7 THE COURT: Well, someone must have done some  
8 investigation early on.

9 MR. HOLLAND: We will do our best to answer the  
09:56 10 complaint.

11 THE COURT: You know what the most common motion in  
12 front of me is?

13 MR. HOLLAND: What is that, your Honor?

14 THE COURT: Motion for an extension of time. You know  
15 how to do it, okay?

16 MR. HOLLAND: All right, thank you.

17 THE COURT: All right, thank you. Bye-bye.

18 THE CLERK: Judge, it's Maryellen. Can counsel just  
19 file a joint, so it's on our docket, a joint amended schedule  
09:56 20 of all the deadlines because we didn't actually set the  
21 deadlines. We just set days.

22 MR. KETTLEWELL: We'll do that, your Honor, because  
23 the government is very swamped, as we understand.

24 THE COURT: And I forget, Ms. Sagar, where are you  
25 right now?

1 MS. SAGAR: Washington, your Honor.

2 THE COURT: You're in the law firm?

3 MS. SAGAR: Yes, your Honor, Hogan Lovells.

4 THE COURT: The reason I say that is, I know there  
5 have been various law students over time, and I just wanted --  
6 this is a compliment. People used to say this to me, and they  
7 don't say it anymore. But you look quite young, and I wasn't  
8 sure whether you were a graduate or a recent graduate or  
9 whether you were at the firm.

09:57 10 MS. SAGAR: I'll take it as a compliment, your Honor.

11 THE COURT: You'll get to the point like me where  
12 people long ago stopped asking me that question. And  
13 Mr. Kettlewell is exactly my age, so there we go.

14 Okay, thank you. Bye-bye.

15 MR. KETTLEWELL: Bye-bye.

16 THE CLERK: So, Bill, if you can get that in by  
17 June 10, that would be great.

18 MR. KETTLEWELL: Yes, Maryellen.

19 THE CLERK: All right, thank you.

09:57 20 THE COURT: Thank you. Bye.

21 (Adjourned, 9:57 a.m.)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I, Lee A. Marzilli, Official Federal Court Reporter,  
do hereby certify that the foregoing transcript, Pages 1  
through 19 inclusive, was recorded by me stenographically at  
the time and place aforesaid in Civil Action No. 20-11297-PBS,  
BAGLY v. United States Department of Health and Human Services,  
et al, and thereafter by me reduced to typewriting and is a  
true and accurate record of the proceedings.

Dated this 4th day of June, 2022.

/s/ Lee A. Marzilli

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LEE A. MARZILLI, CRR  
OFFICIAL COURT REPORTER